

# IN THE UNITED STATES COURT OF FEDERAL CLAIMS

## OFFICE OF SPECIAL MASTERS

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KIMBERLY HICKS, as Parent and \*

Legal Representative of CHASEN HICKS, \*

Petitioner, \*

v. \*

SECRETARY OF HEALTH \*

AND HUMAN SERVICES, \*

Respondent. \*

\*\*\*\*\*

No. 09-028V  
Special Master Christian J. Moran

Filed: April 23, 2010

findings of fact

*Sean Greenwood & Katherine Gonyea*, Christian, Smith & Jewell, Houston, Texas, for  
petitioner;  
*Debra A. Filteau-Begley*, United States Dep't of Justice, Washington, D.C., for respondent.

### FINDINGS OF FACT\*

Kimberly Hicks alleges that certain vaccinations given on January 13, 2006 caused an injury to her son, Chasen. Ms. Hicks seeks compensation pursuant to the National Childhood Vaccine Injury Compensation Program, 42 U.S.C. § 300aa-1 et seq. (2006).

Ms. Hicks has filed medical records about Chasen. Ms. Hicks also asserted, via an affidavit, additional facts about Chasen's condition in the 72 hours following his January 13, 2006 vaccination that are not reflected in any medical records. Exhibit 16. Similar information

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\* Because this unpublished findings of fact contains a reasoned explanation for the special master's action in this case, the special master intends to post it on the United States Court of Federal Claims's website, in accordance with the E-Government Act of 2002, Pub. L. No. 107-347, 116 Stat. 2899, 2913 (Dec. 17, 2002).

All decisions of the special masters will be made available to the public unless they contain trade secrets or commercial or financial information that is privileged and confidential, or medical or similar information whose disclosure would clearly be an unwarranted invasion of privacy. When such a decision or designated substantive order is filed, a party has 14 days to identify and to move to delete such information before the document's disclosure. If the special master, upon review, agrees that the identified material fits within the categories listed above, the special master shall delete such material from public access. 42 U.S.C. § 300aa-12(d)(4); Vaccine Rule 18(b).

was also presented by Ms. Hick's husband and a family friend, Linda Turner. Exhibits 17 and 18.

The parties dispute the accuracy of the affiants' assertions that were not memorialized in a medical record. See Resp't Rep't, filed June 22, 2009, at 15. To resolve this dispute, a hearing was held on November 5, 2009. The witnesses were Ms. Hicks, Mr. Hicks, Ms. Turner, and Gail Cornell, who is Chase's paternal grandmother. After the hearing, Ms. Hicks submitted her original "baby book."<sup>1</sup>

## **I. Standards for Adjudication**

Petitioners are required to establish their cases by a preponderance of the evidence. 42 U.S.C. § 300aa-13(1)(a). The preponderance of the evidence standard requires that the Special Master "believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [special master] of the fact's existence." In re Winship, 397 U.S. 358, 371-72 (1970) (Harlan, J., concurring) (quoting F. James, Civil Procedure 250-51 (1965)).

The process for finding facts in the Vaccine Program begins with analyzing the medical records, which are required to be filed with the petition. 42 U.S.C. § 300aa-11(c)(2). Medical records that are created contemporaneously with the events that they are describing are presumed to be accurate. Cucuras v. Sec'y of Health & Human Servs., 993 F.2d 1525, 1528 (Fed. Cir. 1993).

Not only are medical records presumed to be accurate, they are also presumed to be complete, in the sense that the medical records present all the problems of the patient. Completeness of the medical records is presumed due to a series of propositions. First, when people are ill, they see a medical professional. Second, when ill people see a doctor, they report all of their problems to the doctor. Third, having heard about the symptoms, the doctor records what he (or she) was told.

The presumption that contemporaneously created medical records are accurate and complete, however, is rebuttal. For cases alleging a condition found in the Vaccine Injury Table, special masters may find when a first symptom appeared, despite the lack of a notation in a contemporaneous medical record. 42 U.S.C. § 300aa-13(b)(2). By extension, special masters may engage in similar fact-finding for cases alleging an off-Table injury. In such cases, special masters are expected to consider whether medical records are accurate and complete.

In weighing divergent pieces of evidence, contemporaneously written medical records are usually more significant than oral testimony. Cucuras, 993 F.2d at 1528. However, compelling oral testimony may be more persuasive than written records. Campbell v. Sec'y of Health &

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<sup>1</sup> A copy of a portion of the complete baby book is exhibit 22.

Human Servs., 69 Fed. Cl. 775, 779 (2006) (“like any norm based upon common sense and experience, this rule should not be treated as an absolute and must yield where the factual predicates for its application are weak or lacking”); Camery v. Sec’y of Health & Human Servs., 42 Fed. Cl. 381, 391 (1998) (this rule “should not be applied inflexibly, because medical records may be incomplete or inaccurate”); Murphy v. Sec’y of Health & Human Servs., 23 Cl. Ct. 726, 733 (1991), aff’d, 968 F.2d 1226 (Fed. Cir. 1992).

An assessment of a fact witness’s credibility usually involves consideration of the person’s demeanor while testifying. Bradley v. Sec’y of Health & Human Servs., 991 F.2d 1570, 1575 (Fed. Cir. 1993). Whether contemporaneous medical records or later-given oral testimony is more persuasive is a determination that “is uniquely within the purview of the special master.” Burns v. Sec’y of Health & Human Servs., 3 F.3d 415, 417 (Fed. Cir. 1993).

These criteria provide a basis for evaluating the evidence presented. The evidence includes not only the testimony presented by the witnesses but also all the exhibits filed by the parties. After the hearing, the parties filed a Joint Statement Questions to be Resolved.

## **II. General Observations**

The demeanor of the witnesses suggested that they testified as best they could. They testified about what they remember honestly. They appeared to attempt to be as accurate as possible. Any errors or inconsistencies seem to have been the result of the lapse of time, which produces a fading memory, rather than the result of an intent to mislead.

A basic thrust of the witnesses’ testimony was that although the witnesses observed Chasen do certain things (such as have a fever or cry), the witnesses did not appreciate the significance of the behavior. Chasen’s parents learned to recognize behaviors as manifestations of neurologic problems after Chasen had seizures more extensively. Because the witnesses did not understand what was happening with Chasen in January 2006, he was not taken to a doctor around the time that various events occurred.<sup>2</sup> See, e.g., tr. 153-56. Chasen’s mother and father appeared remorseful that they did not take Chasen to a doctor’s office. With hindsight, it is easy to see that the better course of action would have been to bring Chasen to a doctor for medical care. However, Mr. and Ms. Hicks were deciding how to care for Chasen without the benefit of hindsight. Thus, the absence of medical attention for Chasen during this time period is understandable.

These findings underlie the specific findings made in response to the parties’ submission.

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<sup>2</sup> Thus, this case presents a situation in which the petitioners allege that the medical records are incomplete because the medical records do not document all the important facts about Chasen.

### **III. Resolution of Specific Questions**

- 1. Did Chasen Hicks exhibit symptoms and/or signs of "unresponsiveness" within 72 hours of the vaccinations he received on January 13, 2006? If so, what was the nature of his unresponsive episodes.**

Yes. Within 72 hours of the January 13, 2006 vaccinations, Chasen appeared unresponsive. He cried more than usual. Tr. 18-19, 132. On January 15, 2006, Chasen did not focus on his mother as expected. Tr. 52, 57-58. Chasen also had a blank stare on January 16, 2006. Tr. 136. Ms. Turner, a neighbor of the Hicks, saw Chasen not respond to her attempts to get his attention. Tr. 182-87. On January 17, 2006, Chasen did not recognize the lights on his baby swing. Tr. 64.

- 2. Did Chasen Hicks exhibit "twitching" within 72 hours of the vaccinations he received on January 13, 2006? If so, what was the nature of his "twitching episodes?"**

Yes. Within 72 hours of the January 13, 2006 vaccinations, Chasen had twitching episodes. The left side of his face, his eye and his arm jerked. Tr. 28, 134-35, 143. Ms. Hicks saw the twitching on January 18, 2006. Tr. 66-67.

- 3. Did Chasen Hicks experience a fever within 72 hours of the vaccinations he received on January 13, 2006? If so, was the nature of his fever.**

Yes. Within 72 hours of the January 13, 2006 vaccinations, Chasen had a fever. In the afternoon of January 13, 2006, he was very warm or hot. Tr. 17, 20, 47, 132. His temperature was 102 degrees. Tr. 49-50. On January 14, 2006, Chasen's temperature was decreased but was still warm. Tr. 20. On January 15, 2006, Chasen's temperature was further decrease. Tr. 20-21.

- 4. Did Chasen Hicks experience any health related symptoms, not discussed above, within 72 hours of his vaccinations on January 13, 2006?**

Yes. On January 15, 2006, Chasen went limp for a short amount of time and his lips turned blue. Tr. 21-22, 60-62, 165-66. After this event, he was very sleepy. Tr. 22.

### **IV. Conclusion**

These factual findings seem to comport with assumptions made by Dr. Kinsbourne, an expert witness retained by the Hicks, whose amended report has been filed as exhibit 19. Whether these factual findings also comport with assumptions made by Dr. Herkowitz, an expert witness retained by the respondent, is less clear. See exhibit A at 4. A status conference will be held on **Thursday, May 6, 2010 at 2:00 P.M.** The parties should be prepared to discuss whether additional expert reports will be filed.

IT IS SO ORDERED.

S/ Christian J. Moran  
Christian J. Moran  
Special Master